

## DEPARTURES

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**STATE V. SEWARD –October 2, 2009  
SALINE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED  
NO. 100,263 – OCTOBER 2, 2009**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/SupCt/2009/20091002/100263.pdf>.

**FACTS:** Seward pled guilty to charges of rape and aggravated criminal sodomy, and clearly stated his intention during plea negotiations to challenge the constitutionality of off grid sentencing under Jessica’s Law, K.S.A. 21-4643. District judge did not address, and Seward did not ask for specific findings of fact and conclusions of law on the record, on Seward’s constitutional challenges. Seward appealed, initially claiming the concurrent hard 25 sentences imposed under Jessica’s Law were cruel and unusual in violation of federal and state constitutions. Following *State v. Ortega-Cadelan*, 287 Kan. 157 (2008), and *State v. Thomas*, 288 Kan. 157 (2009), Seward sought remand to district court for factual findings and conclusions of law under rubric in *State v. Freeman*, 223 Kan. 362 (1978). Seward also challenged district court’s decision to deny motion for downward durational departure.

**ISSUES:** (1) Constitutional challenges to Jessica’s law and (2) downward durational departure

**HELD:** Under facts in this case, district judge, Seward, and Seward’s counsel share responsibility for absence of adequate *Freeman* findings and conclusions of law in the record. In view of (1) tension in authorities regarding whether a district court or a party has obligation to assure there are adequate findings on the record, (2) newness of constitutional issues raised by Jessica’s Law, and (3) efforts by Seward and counsel to keep issues alive beyond sentencing outstripped actions taken in *Ortega-Cadelan*, *Thomas*, and two other previous cases, Court is willing to remand case to district court for entry of sufficient factual findings and conclusions of law. Emphasis that this case is exceptional. In the future, a defendant who wishes to appeal on the basis of a constitutional challenge to a sentencing statute must ensure the findings and conclusions by the district judge are sufficient to support appellate argument, by filing a motion invoking the judge’s duty under Rule 165 if necessary.

No abuse of district court’s discretion to deny motion for downward durational departure sentence.

**CONCURRENCE AND DISSENT (Luckert, J.):** Concurs with majority’s holding that denial of Seward’s departure motion was not an abuse of discretion. Dissents from majority’s decision to remand case, for additional findings and conclusions of law regarding Seward’s argument that sentence is cruel and

unusual punishment. Does not find case to be exceptional, and believes giving district court the discretion to reopen the record only excuses Seward from having failed to meet his burden to establish cruel and unusual nature of his sentence.

**STATUTES:** K.S.A. 21-4643, -4643(d)

**STATE V. GRACEY– February 6, 2009  
SEDGWICK DISTRICT COURT – AFFIRMED IN PART  
REVERSED IN PART, AND REMANDED  
NO. 99,310**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/supct/2009/20090206/99310.htm>.

**FACTS:** Gracey entered guilty plea to aggravated indecent liberties with a child. District court granted durational departure agreed to by the state, but found it was barred by statute from granting dispositional departure sought by Gracey. On appeal, Gracey claimed district court lacked jurisdiction to sentence him under K.S.A. 21-4643 where charging instrument did not allege he was over the age of 18, and claimed district court erred in refusing to consider a dispositional departure of probation. State also argued the sentence was illegal because district court failed to find factors justifying a downward durational sentence.

**ISSUES:** (1) Sufficiency of the charging instrument, (2) dispositional departure in sentencing, and (3) legality of downward durational sentence

**HELD:** Under facts and circumstances, Gracey was adequately informed of crime charged and the penalty. He did not contend impairment of his defense or right to fair trial, and conviction has not been shown to affect any subsequent prosecution. Based on limited standard of review, no reversible error in district court's decision to apply K.S.A. 21-4643 in sentencing Gracey.

For defendants convicted of certain sexually motivated or sexually violent crimes committed before July 1, 2008, and sentenced pursuant to K.S.A. 21-4643(d), a departure sentence includes both durational and dispositional departures. Because district court ruled as matter of law that it could not consider a downward dispositional departure, case is reversed and remanded for re-sentencing.

Downward durational sentence pronounced from the bench was not an illegal sentence. District court's stated reason — the mental capacity of the defendant as set forth by the parties in the plea agreement — was consistent with statutory grounds for downward durational departure. No determination made as to whether same findings may be used as mitigating factors to justify a departure under K.S.A. 21-4643(d) and as the statutory grounds for departure from a guidelines sentence as set out in K.S.A. 21-4643(d)(5).

**STATUTES:** K.S.A. 2008 Supp. 21-4719(a); K.S.A. 2006 Supp. 21-3504(a)(1)(C), -3504(a)(3)(A), -3504(c), -4643(a)(1), -4643(d)(5), -4704(a); and K.S.A. 21-3504(c), -4643, -4643(a), -4643(a)(1), -4643(a)(1)(C), -4643(d), -4643(d)(5), -4701 et seq., -4703(f), -4719, -4719(a), -4721(d), 22-3201(c), -3504(1), -3601(b)

**STATE V. THOMAS – January 9, 2009  
SALINE DISTRICT COURT– REVERSED AND REMANDED  
NO. 99,633**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/ctapp/2009/20090109/99633.htm>.

**FACTS:** Thomas pled guilty to aggravated indecent liberties with a child, M.N.R., and in exchange the state dismissed rape charges. Thomas was 19 years old at the time and M.N.R. was 15 years old. Thomas filed a departure motion based on M.N.R. being the aggressor and the degree of harm or loss attributed to the crime was significantly less than typical for such an event. M.N.R. testified to the contrary at the sentencing hearing. At the sentencing hearing, the district court failed to make explicit findings resolving the many instances of contradictory testimony. The district court granted Thomas' motion for a

dispositional departure and placed him on probation with community corrections for 36 months. The district court's reasons for departure were that Thomas had no criminal history and M.N.R.'s conduct leading to the offense of her suggestive behavior in wearing only a t-shirt and underwear while watching television with Thomas late at night.

**ISSUE:** Departure factors

**HELD:** Court held the conduct of M.N.R., specifically that M.N.R. was wearing only a t-shirt and underwear while alone with Thomas, did not rise to the level of aggression or participation required to furnish a substantial and compelling reason for departure under K.S.A. 21-4716(c)(1)(A). Court also held it was also unwilling to conclude that M.N.R.'s behavior constituted a substantial and compelling reason for a departure as a matter of law. Had the district court made specific findings that M.N.R. participated in the sexual intercourse and consented to it, this would have supported a departure sentence. Court stated that upon remand, the district court must impose a presumptive sentence unless the district court makes additional findings warranting a departure.

**DISSENT:** Judge Greene dissented and held the district court's findings were a substantial and compelling reason for departure and had previously been viewed as adequate for this court to affirm dispositional departures.

**STATUTE:** K.S.A. 21-4716(c) (1), 4721(a), (d)

**STATE V. SNOW— November 14, 2008  
JOHNSON DISTRICT COURT – AFFIRMED  
NO. 98,549**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/ctapp/2008/20081114/98549.htm>.

**FACTS:** Snow was convicted of burglary, theft, and criminal damage to property. The jury found aggravating factors supported an upward durational departure, including that Snow was not amenable to probation, posed a significant risk to the community, would more likely than not reoffend, and posed a risk of harm to the fact witnesses against him. The court imposed a controlling sentence of 92 months. The Supreme Court affirmed his conviction, but remanded for resentencing because the total sentence exceeded the statutory maximum. On remanded, the district court again imposed a 92-month sentence by doubling his presumptive sentence of 23 months, resulting in a base sentence of 46 months.

**ISSUES:** (1) Jurisdiction, (2) sentencing, and (3) departure factors

**HELD:** Court rejected Snow's argument that the district lacked jurisdiction to resentence beyond the 23-month presumptive sentence. Court held that when a defendant's controlling sentence in a multiple conviction case is found to be illegal because it exceeds the statutory maximum, the district court may resentence the defendant on each individual count. Court held the use of nonstatutory aggravating factors to increase Snow's sentence did not violate his constitutional due process rights. Court concluded the aggravating factors the district court used to increase Snow's sentence were not so vague as to offend due process. At the hearing for the jury to determine the existence of aggravating factors, the state called as witnesses a probation officer and two of Snow's victims. The victims testified about the significant impact Snow's crimes had on their respective businesses. The probation officer described the available probation options in Johnson County and the different types of reporting requirements for each level of supervision. This testimony was relevant to the alleged aggravating factors the district court submitted to the jury for consideration, and in the context of the evidence, the key terms were not vague. Court found the Kansas Supreme Court has held that nonamenability to probation may constitute a substantial and compelling reason for an upward durational departure, as well as a substantial and compelling reason for a dispositional departure. Consequently, it is not required that all the reasons given for departure by the sentencing court support the departure; as long as one or more of the factors relied upon by the sentencing court is substantial and compelling, the departure sentence will be affirmed.

**STATUTES:** K.S.A. 21-3102(1), -3701, -3715, -3720, -4603(f), -4716(c)(2), -4720(b)(4), -4721(d)

**STATE V. HORN – November 7, 2008**  
**JOHNSON DISTRICT COURT – AFFIRMED**  
**NO. 97,872**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/ctapp/2008/20081107/97872.htm>.

**FACTS:** Horn pled guilty to seven sex crimes with 10-year-old. Departure hearing jury found aggravating factor of a fiduciary relationship on counts of aggravated sodomy and aggravated indecent liberties. On appeal Horn claimed: (1) no statutory authority for impaneling jury to consider upward departure factor when a plea has been entered; (2) fiduciary relationship is an unconstitutionally vague term, existence of a fiduciary relationship is not an appropriate factor for aggravated indecent liberties and aggravated sodomy because this results in lesser sentences for stranger molestation than family molestation, and trial court held no pretrial hearing to determine whether existence of a fiduciary relationship was a proper factor to consider in this case; (3) abuse of discretion to admit evidence of Horn's sex crimes against victim; (4) Confrontation Clause violated by allowing video of victim's statements to be played when victim had not testified about the crimes at the sentencing hearing; (5) jury instructions failed to guide and focus jury on aggravating factor; (6) judgment for acquittal should have been granted because insufficient evidence of a fiduciary relationship; (7) error to not require mitigating evidence to be submitted with the aggravating evidence; and (8) district court failed to make proper and required finding that aggravating factor was substantial and compelling.

**ISSUES:** (1) Departure hearing and guilty plea, (2) fiduciary relationship, (3) evidence of sex crimes, (4) right to confrontation, (5) jury instructions, (6) sufficiency of the evidence, (7) mitigating evidence, and (8) substantial and compelling aggravating factor

**HELD:** Reference to "trial jury" in K.S.A. 21-4718 does not limit ability of State to only ask for upward durational departures where not guilty pleas were entered and a jury trial was held to determine guilt or innocence.

The term "fiduciary relationship" in K.S.A. 21-4716(c)(2)(D) is not vague or overbroad. Horn's second challenge to is for legislature rather than the courts. Third, district court is not required to make pretrial analysis of whether a fiduciary relationship is a proper factor to be presented to the jury.

Under facts, no abuse of discretion in admitting evidence of sex acts between Horn and victim as evidence supporting the establishment of a fiduciary relationship between the parties.

Under facts, Horn's constitutional right to confrontation not violated because victim was available for cross-examination in proceedings below and case law indicates confrontation requirements do not apply to post-conviction proceedings.

Under facts of case, a cautionary instruction should have been given, but error was not clearly erroneous. Under facts, sufficient competent evidence supported the jury's verdict. Motion for acquittal was properly overruled.

Horn was given every reasonable opportunity to present mitigating evidence, but chose not to do so. Although district court did not specifically state at sentencing hearing that upward durational departure sentence was being entered because the fiduciary relationship was a substantial and compelling factor and better practice would be for sentencing court to do so, this rationale was expressed in court's statements.

**STATUTES:** K.S.A. 2006 Supp. 21-4718(b)(7); K.S.A. 21-3504, -3506, -3516, -4716, -4716(b), -4716(c)(1)-(2), -4716(c)(2)(D), -4716(d), -4718, -4718(a)(4), -4718(b)(2)-(7), -4720, -4720(c), -4720(c)(1), 60- 401(b), -405, -407(j) -455; K.S.A. 2000 Supp. 21-4716

**STATE V. BRYANT– September 5, 2008**  
**JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR**  
**RESENTENCING**  
**NO. 96,192**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/ctapp/2008/20080905/96192.htm>.

**FACTS:** Bryant was convicted of securities fraud based on his offering of an investment program that was characterized as a high-yield investment fraud program. Based upon the jury's finding of a fiduciary relationship, the district court granted a six-month upward durational departure in addition to Bryant's 18-month base sentence.

**ISSUES:** (1) Speedy trial, (2) expert testimony, and (3) departure sentencing based on fiduciary relationship

**HELD:** Court affirmed Bryant's conviction, concluding his statutory right to a speedy trial was not violated because a three month period was properly attributable to him, and the district court properly admitted expert testimony involving the hallmark characteristics of high-yield investment fraud schemes. However, the Court reversed the trial court's imposition of an aggravated durational departure based upon the existence of a fiduciary relationship. Court concluded that because a fiduciary relationship was necessarily inherent in the crime charged in this case, it could not be used as aggravating factor to support a durational departure.

**STATUTES:** K.S.A. 17-1253; K.S.A. 21-4716(a); K.S.A. 22-3402(2); and K.S.A. 60-456(b)

**STATE V. ORTEGA-CADELAN – October 31, 2008**  
**SEDGWICK DISTRICT COURT – AFFIRMED**  
**NO. 98,713**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/supct/2008/20081031/98713.htm>.

**FACTS:** Ortega Cadelan was convicted of committing an act of sexual intercourse with a 5 year old child, his stepdaughter, on or between November 1, 2006, and November 27, 2006. He pled guilty to the statutory rape charge under a plea agreement with the State, and in exchange, he was free to seek a sentencing departure. Ortega Cadelan filed a motion requesting a durational departure sentence pursuant to K.S.A. 2006 Supp. 21 4643(d), in effect at the time of the offense, and he presented arguments at the sentencing hearing. The district court found none of the reasons asserted by Ortega Cadelan in his departure motion or at the sentencing hearing were substantial and compelling reasons to depart from the mandatory minimum sentence. Pursuant to K.S.A. 2006 Supp. 21 4643(a)(1), the court sentenced Ortega Cadelan to a mandatory life sentence without the possibility of parole for 25 years. And, pursuant to K.S.A. 2006 Supp. 22 3717(d)(1)(G), the court ordered postrelease supervision for the remainder of Ortega Cadelan's natural life.

**ISSUES:** (1) Cruel or unusual punishment and (2) departure sentencing

**HELD:** Court addressed the three considerations used for evaluating a sentence as cruel and unusual. However, Court held that Ortega-Cadelan's argument that his sentence was cruel and unusual, presented for the first time on appeal, was not properly before the Court. Court stated that a review of the sentencing transcript shows that the district court considered all of Ortega Cadelan's arguments, acknowledged the mitigating circumstances asserted by Ortega Cadelan, and explained why it chose to reject the request for a downward durational departure. Court found that reasonable people could agree with the district court's assessment of whether the mitigating circumstances were substantial and compelling and therefore the district court did not abuse its discretion by denying Ortega Cadelan's motion for a downward durational departure.

**STATUTES:** K.S.A. 21-3502(a), -3717(d) (1) (G), -4643(a), (d), -4701, -4703, -4706, -4716(c)(1), -4721(c)(1); K.S.A. 22-3601; K.S.A. 60-1507

**STATE V. RUTHERFORD – June 6, 2008  
ANDERSON DISTRICT COURT – AFFIRMED  
NO. 96,878**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/ctapp/2008/20080606/96878.htm>.

**FACTS:** Rutherford was convicted of aggravated criminal sodomy and aggravated indecent liberties with a child based on contact he had with the daughter (C.R.) of his girlfriend (B.R.). C.R. has development delays and functions at a level similar to a child who is 2 years old or younger. Rutherford admitted to some conduct that may have been in appropriate and that he could possibly have hurt C.R. when he gave her baths.

**ISSUES:** (1) Probable cause, (2) sufficiency of the evidence, and (3) departure sentencing

**HELD:** Court rejected Rutherford's argument that the state's case at the preliminary hearing was inappropriately based on his prior conviction and his status as a registered sex offender. Court ultimately concluded that even if the prior conviction and the sex offender registration were the only evidence presented at the preliminary hearing to support a finding of probable cause, the district judge's subsequent decision to prohibit such evidence at trial precluded any finding of prejudice. Court held it was unlikely the jury would have returned a different verdict with an instruction defining "lewd" and there was sufficient evidence to support the jury's rational belief that Rutherford engaged in lewd fondling or touching done with the intent to arouse or to satisfy sexual desires. Court held that even if the district court erred in granting a departure based on the vulnerable age of the victim because it was already an element of the crime, it was not reversible error because the court based its departure on two other factors not challenged by Rutherford.

**STATUTES:** K.S.A. 21-3503, -3504, 3506, -4721(d); K.S.A. 22-3208, -3414

**STATE V. MARTIN– February 1, 2008  
SEDGWICK DISTRICT COURT – AFFIRMED  
COURT OF APPEALS – REVERSED  
NO. 95,819**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/supct/2008/20080201/95819.htm>.

**FACTS:** As she drove a car, Martin had her 16-year-old son fire four shots from a handgun at an occupied house. No one was injured inside the house. Martin pled guilty to criminal discharge of a firearm at an occupied dwelling and contributing to a child's misconduct. Because of the firearm conviction, there was a presumptive imprisonment for the charges. The district court granted an upward dispositional departure and ordered Martin to serve a prison sentence. The Court of Appeals vacated the sentence ordered resentencing

**ISSUES:** (1) Departure factors, (2) fiduciary relationship, and (3) callous and cowardly disregard for human life

**HELD:** Court held that a defendant mother violated the special fiduciary relationship and unique position of trust between herself and her codefendant 16-year-old son when she handed him a loaded gun, she urged him to shoot at an occupied house as she drove by, and he complied. Court held the violation of a mother's special fiduciary relationship and unique position of trust with her son is a valid departure factor. Court also held the violation of a defendant mother's special fiduciary relationship and unique position of trust with her codefendant son is a substantial and compelling reason to depart from the presumptive sentence.

**STATUTES:** K.S.A. 20-3018(b); K.S.A. 21-3612(a) (5), -4219(b), -4716(a), (c), (d); K.S.A. 60- 455

**STATE V. BLACKMON– February 1, 2008  
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART AND  
REVERSED IN PART  
COURT OF APPEALS – VACATED AND REMANDED  
NO. 95,696**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/supct/2008/20080201/95696.htm>.

**FACTS:** Jury found Blackmon guilty of unintentional second degree murder. Finding the facts did not encompass the manifest indifference to the value of human life required by the second degree murder statute; district court granted Blackmon's motion for departure sentence and imposed a downward durational departure sentence equivalent to the presumptive sentence for involuntary manslaughter. State appealed, claiming in part the record did not support the district court's departure sentence. Court of appeals reversed in unpublished opinion. Blackmon's petition for review granted.

**ISSUES:** Departure sentence

**HELD:** Court of Appeals correctly found the sentencing court's disagreement with jury's verdict is not a substantial and compelling reason for departure. Blackmon's alternative argument, that statutory departure factors can be "gleaned" from the evidence and district court's vague statements regarding facts of case, is rejected. When a sentencing court fails to state substantial and compelling reasons on the record for a downward departure, and the sentence is vacated on appeal, upon remand the sentencing court may cite appropriate reasons justifying the imposition of a downward departure sentence and may impose such a sentence subject to the usual review process. Remanded for district court's further consideration of Blackmon's motion for departure sentence.

**STATUTES:** K.S.A. 2006 Supp. 21-4716(a), -4716(c), -4718(a)(4); K.S.A. 20- 3018(b), 21-3402(b), -4721(d), 60-2101; K.S.A. 2001 Supp. 21-4704a(k); K.S.A. 1998 Supp. 21-4716(b)(1)(A) and (E)

**STATE V. GREEN– December 14, 2007  
JOHNSON DISTRICT COURT – AFFIRMED  
NO. 95,487**

For full text of this opinion, go to <http://www.kscourts.org/Cases-and-Opinions/opinions/ctapp/2007/20071214/95487.htm>.

**FACTS:** Green was convicted of three counts of identity theft using the same person's identity, but at three different retailers over a two-day period. The court sentenced Green to an upward departure sentence after the jury agreed that the aggravating factors existed beyond a reasonable doubt.

**ISSUES:** Identity theft and departure sentence

**HELD:** Court held there are many ways to commit identity theft. Court stated there is sufficient evidence of each of Green's use of someone else's identity. Court held that each time an innocent person's identity is intentionally used for some fraudulent purpose it is a crime and that each use of another person's identity is a unit of prosecution for the crime of identity theft. Court held at least one of the aggravating factors was substantial and compelling and therefore the upward departure sentence was upheld. Court reaffirmed the statutory language that the list of statutory aggravating factors is a nonexclusive list. Court also held the criminal history of a defendant is not a jury question.

**STATUTES:** K.S.A. 2004 Supp. 21-3106(8), (10), -4018(a), -4716(c); K.S.A. 21-4720(c)

**STATE V. MARTINEZ – August 17, 2007**  
**BARTON DISTRICT COURT – AFFIRMED IN PART, SENTENCED VACATED, AND REMANDED**  
**WITH DIRECTIONS**  
**NO. 96,613**

For full text of this opinion, go to <http://www.kscourts.org/kscases/ctapp/2007/20070817/96613.htm>.

**FACTS:** After a controlled-drug buy, Martinez plead guilty to an amended charge of possession of cocaine and endangering a child. Martinez is an illegal alien. At sentencing, the court stated that it could not follow the sentencing guidelines because if Martinez was granted probation, he would violate the terms of his probation immediately because of this illegal status and the violation of federal and/or state law. The trial court imposed an upward dispositional departure sentence by denying presumptive probation and sentenced Martinez to prison based on Martinez' illegal alien status as a substantial and compelling reason for departure. The court also ordered Martinez to reimburse the Board of Indigent Defenses Services (BIDS) for his attorney fees.

**ISSUES:** (1) Sentencing, (2) departure, and (3) illegal alien

**HELD:** Court stated that if a defendant's continued presence in the United States is in violation of federal immigration law, that fact alone may constitute a substantial and compelling reason to deny presumptive probation. However, court found that the trial court made no finding whether Martinez had previously been deported and the court remanded to the trial court for such a finding. Court stated that the district court did not engage in an adjudication of Martinez' immigration status, but simply recognized that counsel volunteered the information that Martinez was not legally in this country. Court held that on remand the trial court is permitted to consider whether Martinez has been deported in the past in determining his amenability to probation. Court also held the trial court failed to give adequate notice of its intent to depart. Court stated that when the sentencing judge gave notice to her intent to depart, Martinez was not provided an adequate opportunity to marshal and present his arguments against departure before sentence was pronounced. Court also vacated the order for BIDS fees and remanded for compliance with State v. Robinson, 281 Kan. 538.

**STATUTES:** K.S.A. 2006 Supp. 20-345, -346 and K.S.A. 2006 Supp. 21-4513, 4610, -4716(c), -4718(a)(3).

**STATE V. LEWIS – July 13, 2007**  
**SEDGWICK DISTRICT COURT– AFFIRMED IN PART**  
**AND DISMISSED IN PART**  
**NO. 94,837**

For full text of this opinion, go to <http://www.kscourts.org/kscases/ctapp/2007/20070713/94837.htm>.

**FACTS:** Lewis convicted of voluntary manslaughter and criminal possession of firearm. On appeal he claimed district court erred in not granting motion to discharge jury wherein Lewis alleged venire panel was unconstitutionally comprised by county's jury selection procedure which resulted in disparity in representation of African-Americans. Second, he claimed the state improperly exercised peremptory challenge in a discriminatory manner to excuse one of three African-Americans on the jury panel. Third, he claimed the district court abused its discretion in denying Lewis' motion for downward sentencing departure.

**ISSUES:** (1) Motion to discharge jury panel, (2) Batson challenge, and (3) sentencing departure

**HELD:** District court properly denied motion to discharge jury. Statistical disparity in this case does not establish purposeful discrimination, and no showing that county's failure to compel jury service through K.S.A. 43-165 constituted a system of discrimination which worked to cause disparity in the jury representation of a distinct segment of the community. Taylor v. Louisiana, 419 U.S. 522 (1975), is distinguished.



Record supports prosecutor's explanation that he did not wish to have unemployed jurors on the jury panel and the challenged African-American was young. Based on record on appeal, district court's determination that Lewis failed to establish purposeful discrimination in state's exercise of its peremptory challenge is reasonable and not an abuse of discretion.

Appellate court has no jurisdiction to review a presumptive sentence under the state sentencing guidelines. This issue is dismissed.

**STATUTE:** K.S.A. 21-4721(c)(1), 22-3407, 43-156, -165

**STATE V. WILLIAMS – March 16, 2007**  
**SEDGWICK DISTRICT COURT – APPEAL DISMISSED**  
**NO. 95,155**

For full text of this opinion, go to <http://www.kscourts.org/kscases/ctapp/2007/20070316/95155.htm>.

**FACTS:** Williams convicted on guilty plea to various criminal charges. District court denied Williams' motion for a durational and dispositional downward departure sentence, and imposed sentence within the presumptive guideline range. Williams appealed, challenging the sufficiency of the factual basis for his plea, and claiming the trial court abused its discretion in denying the departure motion.

**ISSUES:** (1) Appellate jurisdiction to review Guilty plea, and (2) appellate jurisdiction to review denial of downward departure motion

**HELD:** Proper procedure for challenging sufficiency of the factual basis for a plea is a district court motion to withdraw the plea. Pursuant to *State v. Thorpe*, 36 Kan.App.2d 475 (2006), appellate court lacks jurisdiction to review Williams' guilty plea because he did not move to withdraw his plea.

Sentencing court followed plea agreement and imposed a presumptive sentence, thus appellate court lacks jurisdiction to review the denial of Williams' departure motion.

**STATUTES:** K.S.A. 2006 Supp. 21-3413(a)(1), -3701(a)(1), -3701(b)(4), 22-3210(a)(4), - 3210(d), - 3602(a), 65-4160(a); and K.S.A. 21-3701(a)(1), -3701(b)(2), -3715(a), -3715(c), -4721(c)

**STATE V. SCOVILLE– March 9, 2007**  
**DICKINSON DISTRICT COURT – AFFIRMED**  
**NO. 96,405**

For full text of this opinion, go to <http://www.kscourts.org/kscases/ctapp/2007/20070309/96405.htm>.

**FACTS:** Scoville filed no appeal from downward departure sentence imposed June 2003, but in February 2004 filed motion to correct illegal sentence. District court's denial of that motion was affirmed on appeal. Scoville then filed motion to file a direct appeal out of time. District court denied that motion. Scoville appealed.

**ISSUE:** Motion to file appeal out of time

**HELD:** Under facts, substantial competent evidence supported district court's denial of Scoville's motion to file appeal out of time. District court correctly found none of the three exceptions in *State v. Ortiz*, 230 Kan. 733 (1982), existed to excuse Scoville's failure to file a timely notice of appeal of his sentencing. *State v. Willingham*, 266 Kan. 98 (1998) is factually distinguished.

**STATUTES:** K.S.A. 22-3504, -3608(c), 65-4159

**STATE V. SNOW – October 27, 2006**  
**JOHNSON DISTRICT COURT – CONVICTIONS AFFIRMED, SENTENCES VACATED, AND**  
**REMANDED FOR RESENTENCING**  
**NO. 93,749**

For full text of this opinion, go to <http://www.kscourts.org/kscases/supct/2006/20061027/93749.htm>.

**FACTS:** Snow, his brother, and Charles Miller broke into several stores in Johnson County and stole various items valued at over \$60,000. The trio also stole a van valued at nearly \$5,000 to assist in the thefts. When Miller was arrested, he confessed to these crimes and advised police of the other two as accomplices. Miller was given immunity. A jury convicted Snow of 15 felony counts of nonresidential burglary, theft and criminal damage to property, and four counts of misdemeanor criminal damage to property.

**ISSUES:** (1) Admission of evidence, (2) prosecutorial misconduct, (3) cumulative error, and (4) sentencing

**HELD:** Court affirmed Snow's conviction, but remanded for resentencing. Court held the district court did not err in admitting the telephone conversation between Snow and his bondsman. Court rejected Snow's argument about lack of foundation because the phone monitor was competent to testify regarding the authenticity and correctness of the audio recording. Court held the trial court erred by not redacting references to Snow's other bad acts from the audio recording, but that the error was harmless. Court found the trial court did not abuse its discretion by allowing the state's endorsement of a jail house witness on the eve of trial because Snow could not claim any surprise and the witnesses' testimony was not critical for Snow's conviction. Court agreed that the prosecutor's comments on Snow's right to a jury trial were outside the considerable latitude prosecutors are allowed, but that the comments were brief in the context of the trial and probably had little if any weight in the minds of the jurors when considered in light of the evidence presented. Court found no support for Snow's claim that cumulative errors denied him a fair trial. Court held that Snow's sentence violated the maximum sentence statutes and remanded for resentencing. Court briefly addressed the constitutionality of the aggravated factors statute, the nonstatutory aggravating factors, aggravated factors already included in the severity level of Snow's crime, use of his criminal history, and the consecutive nature of his misdemeanor sentences.

**STATUTES:** K.S.A. 20-3018(c); K.S.A. 2005 Supp. 21-3701, -3715, -3720, 4636(f), -4716, -4719, -4720(b)(4), (c)(3); K.S.A. 2005 Supp. 22-3201(g), and K.S.A. 60-401(b), -455.

**STATE V. CHESBRO – May 12, 2006**  
**SALINE DISTRICT COURT – AFFIRMED**  
**NO. 93,454**

For full text of this opinion, go to <http://www.kscourts.org/kscases/ctapp/2006/20060512/93454.htm>.

**FACTS:** Chesbro entered guilty plea to aggravated indecent liberties with a child. District court rejected downward departure sentence recommended in plea agreement and imposed 110-month's sentence pursuant to sex offender provisions in K.S.A. 2005 Supp. 21-4704(j). On appeal from denial of his motion to withdraw plea, Chesbro claimed: (1) district court's failure to adequately inform of potential maximum sentence or warn of potential application of 21-4707(j) denied due process; (2) State breached plea agreement by not encouraging the recommended departure sentence at sentencing; (3) error to rule on motion to withdraw plea without a full hearing; (4) error to find prior Nebraska conviction qualified as sexually motivated crime for application of 21-4707(j); and (5) error for district court to state it had no discretion to consider downward durational departure sentence due to mandatory language in 21-4704(j).

**ISSUES:** (1) Due process, (2) breach of plea agreement, (3) hearing, (4) evidence of prior crime, and (5) departures

**HELD:** Under the circumstances, district court's failure to advise of potential sentencing consequences under 21-4704(j) did not render plea unknowing or involuntary. No manifest injustice demonstrated where

sentence doubled by sex offender statute was still less than potential maximum penalty cited by court prior to accepting plea.

No case in Kansas or any other jurisdiction has ruled on analogous facts. Although state would have been well advised to advise sentencing court of recommendation within plea agreement, due process requires no enthusiastic argument absent a specific agreement to do so. District court found no factual basis for downward departure sentence and was aware through plea agreement that state had joined in sentencing recommendation, thus state's failure to make affirmative statement at sentencing did not prejudice Chesbro's due process rights and is, though error, constitutionally harmless.

No error in deciding motion to withdraw plea without a hearing where only questions of law to be decided. Any error in refusing to allow evidence regarding nature of Chesbro's prior crime was harmless where no conceivable facts would have avoided conclusion that persistent sex offender provisions in 21-4707(j) applied.

District court erroneously believed persistent sex offender provisions permitted no departure sentence. Provisions in K.S.A. 2005 Supp. 21-4716(c) may be applied to depart from statutorily mandated sentence imposed upon one qualifying as a persistent sex offender. Because sentencing court affirmatively noted the record provided no basis to support a departure sentence, no reversal of the sentence is needed.

**STATUTES:** K.S.A. 2005 Supp. 21-3502(a)(2), -4704 sections (a), (d), (f)-(i), (j)(1)-(2), (k) and (l), -4716, -4716(c), 22-3210(a), -3210(a)(2), -3210(d), -3717(d)(2), -3717(d)(2)(L); and K.S.A. 21- 3502, 3504(a)(3)-(4), (c), -3510(a)(1), -3511(a), 22-3717, -3424(e), 60-261, -1507.

**STATE V. BOLDEN – April 28, 2006**  
**SEWARD DISTRICT COURT – AFFIRMED**  
**NO. 93,806**

For full text of this opinion, go to <http://www.kscourts.org/kscases/ctapp/2006/20060428/93806.htm>.

**FACTS:** Bolden drove her car into the side of another car, pushed it off the road, and then struck it again from behind. The other car was occupied by Bolden's husband and his girlfriend. The girlfriend had previously obtained a protection from abuse order against Bolden. A jury convicted Bolden of two counts of aggravated battery, two counts of aggravated assault, one count of criminal damage to property, one count of violation of a protection order, and one count of reckless driving. The district court sentenced Bolden to a presumptive prison sentence of 29 months. However, the district court granted a dispositional departure and placed Bolden on 24 months' probation based on four factors: (1) the victim's actions invited the reaction; (2) the long-term effects on Bolden's children were not justified; (3) Bolden sought help for anger control; and (4) the probability of reformation was increased with probation. The state appealed the sentence.

**ISSUES:** Are there substantial and compelling reasons to justify the departure sentence?

**HELD:** Court affirmed the departure sentence. Court stated that not all the reasons given by the sentencing court to support a departure sentence must be substantial and compelling as long as one or more of the factors relied upon is substantial and compelling. Court held that under the facts of this case, the sentencing court's finding that the victims' behavior invited Bolden's conduct was not a substantial and compelling basis for a dispositional departure. However, the remaining factors cited by the sentencing court, considered collectively, were sufficient to justify the downward departure.

**STATUTES:** K.S.A. 2005 Supp. 21-4716(a), (c).

**STATE V. HANEY and STATE V. USSERY – August 5, 2005**  
**DOUGLAS DISTRICT COURT – REVERSED AND REMANDED**  
**NOS. 92,779 AND 92,780**

For full text of these opinions, go to <http://www.kscourts.org/kscases/ctapp/2005/20050805/92779.htm> or <http://www.kscourts.org/kscases/ctapp/2005/20050805/92780.htm>.

**FACTS:** Four young men convicted of raping 13-year-old victim. Haney, Ussery, and another were convicted as adults. The fourth was convicted as juvenile, with 30-month sentence. Trial court imposed departure sentences for Haney and Ussery of 60 months probation with underlying 30 month sentences, based on findings of lesser culpability for these defendants than the juvenile offender, lesser degree of harm or loss to victim than in typical statutory rape cases, victim participation, and various guideline policy considerations. State appealed the departure sentences.

**ISSUE:** Departure sentence

**HELD:** Similar opinions entered in both cases, noting woefully inadequate records provided by state. Downward departure sentences are reversed. Any proper consideration of each defendant's relative age, immaturity, and impaired judgment was inextricably involved with impermissible consideration of juvenile codefendant's sentence, rather than as distinguished from average adult offender. Sentencing court's use of perceived lack of harm or loss to victim is disapproved where record is silent on what constitutes typical harm or loss for this offense. No error in considering victim's participation. Without trial transcript, unable to say district court's reliance on this statutory finding was not supported by substantial competent evidence. Proper to consider totality of guidelines policy considerations. Departure from standard presumptive 155-month sentence in each case was excessive under circumstances, and constituted abuse of judicial discretion. Sentences are vacated and remanded for re-sentencing proportionate to severity of act committed. State's conclusory claim that sentences were improperly motivated by partiality, prejudice, oppression, or corrupt motive fails.

**STATUTES:** K.S.A. 2004 Supp. 21-3502(a)(2), -3516, -3522, -3522(a)(1), -4716(a), -4716(c)(1)(A) and (C); K.S.A. 2002 Supp. 21-4704; K.S.A. 21-3503, 3504(a)(1), -3506(a)(1) and (2), -3511, -3518, -4721(a), 38-1636

**STATE V. NERI – August 13, 2004**  
**JOHNSON DISTRICT COURT- REVERSED AND REMANDED**  
**NO. 91,020**

For full text of this opinion, go to <http://www.kscourts.org/kscases/ctapp/2004/20040813/91020.htm>.

**FACTS:** Neri convicted of 7 counts of forgery in bank account for youth softball program. Although Neri qualified for presumptive probation, trial judge imposed upward dispositional departure sentence, finding children in the program were particularly vulnerable victims. Neri appealed.

**ISSUE:** Vulnerable victim as aggravating sentencing factor

**HELD:** No Kansas case has addressed this issue. Essence of the vulnerable victim aggravating sentencing factor at K.S.A. 2003 Supp. 21-4716(c)(2)(A) is that vulnerability somehow facilitates commission of the crime. Where victim is an organization, as opposed to a person, a finding of vulnerability is less applicable. Neri did not steal money from children, and youth participants in the baseball league did not render an organization administered by adults vulnerable. Sentencing court's finding that Neri showed extreme indifference to a vulnerable victim is not supported by evidence. Case is reversed and remanded for re-sentencing.

**STATUTES:** K.S.A. 2003 Supp. 21-3710, -4716(c)(2)(A); K.S.A. 21-4721(d).